

THE WILDERNESS SOCIETY ET AL.

IBLA 90-490

Decided May 1, 1991

Appeal from a decision of the California State Director, Bureau of Land Management, denying protests of elimination of the South Fork Eel River Unit 1 from further consideration as a wilderness study area. AR-77.

Affirmed.

1. Federal Land Policy and Management Act of 1976:
Wilderness--Wilderness Act

In order to demonstrate error in a BLM decision to eliminate an inventory unit from further consideration as a wilderness study area pursuant to secs. 201 and 603 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1711 and 1782 (1988), an appellant must point out not only that BLM failed to follow proper procedures but also that the record does not support BLM's substantive conclusions and that a different determination might result from reassessment.

2. Federal Land Policy and Management Act of 1976:
Wilderness--Wilderness Act

In assessing the presence or absence of wilderness characteristics in an inventory unit, BLM necessarily makes subjective judgments which are entitled to considerable deference when challenged on appeal and such judgments may not be overcome simply by expressions of disagreement.

3. Federal Land Policy and Management Act of 1976:
Wilderness--Wilderness Act

Neither the National Environmental Policy Act, 42 U.S.C. § 4332 (1988), nor the Endangered Species Act, 16 U.S.C. § 1536 (1988), contains directives which BLM must observe in evaluating the wilderness characteristics of an area. That evaluation is conducted pursuant to

relevant provisions of the Federal Land Policy and Management Act of 1976 and the Wilderness Act.

APPEARANCES: Stephan C. Volker, Esq., San Francisco, California, for appellants; Lynn M. Cox, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management; David H. Dun, Esq., David E. Martinek, Esq., Eureka, California, for Intervenor, Eel River Sawmills.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Wilderness Society et al., 1/ have appealed from a June 22, 1990, decision of the California State Director, Bureau of Land Management (BLM), denying their protests against elimination of the South Fork Eel River Unit 1 from further consideration as a wilderness study area. By order dated March 15, 1991, BLM's request for expedited consideration by the Board was granted.

Under section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(a) (1988), the Secretary is required to "review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory required by section 1711(a) of this title as having wilderness characteristics described in the Wilderness Act of September 3, 1964 [16 U.S.C. § 1131 (1988)]." From time to time thereafter, the Secretary is required to report his recommendation to the President as to suitability or unsuitability of each such area or island for preservation as wilderness. Congress will make the final decision with respect to designating wilderness areas, after a recommendation by the President. 43 U.S.C. § 1782(b) (1988).

BLM's wilderness review comprises three phases. The first phase - inventory - seeks to locate all lands under BLM's jurisdiction that meet the criteria for wilderness designation. Such lands are designated as wilderness study areas (WSAs). In the second phase, BLM analyzes the WSAs to determine which areas to recommend as suitable for wilderness designation. In the last phase, the Secretary forwards his recommendation to the President.

As a result of BLM's 1979 inventory, the majority of the lands at issue in this appeal were eliminated from further wilderness study. That BLM determination was at issue in Michael Huddleston, 76 IBLA 116 (1983), which involved the Brush Mountain, Elkhorn Ridge, and Cahto Peak units. As to the Brush Mountain and Elkhorn Ridge units, both of which embraced less than

1/ The other appellants are Ancient Forest Defense Fund, Sierra Club, California Trout, Inc., Friends of the River, California Wilderness Coalition, Eric Swanson, Michael Huddleston, Steven Day, and Environmental Protection and Information Center. In addition to the statements of reasons filed by counsel for the Sierra Club, several members of the above organizations filed individual declarations in support of the appeal.

5,000 acres, the Board held that while public land areas of less than 5,000 acres could be inventoried and identified, they could not properly be designated as WSAs because section 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1988), mandates review of roadless areas and islands of the public lands comprising 5,000 acres or more. As to the Cahto Peak unit, the Board affirmed BLM's determination that the unit possessed no outstanding opportunities for solitude or a primitive and unconfined type of recreation and therefore did not meet the criteria of the Wilderness Act, 16 U.S.C. § 1131(c) (1988).

In its answer in the present appeal, BLM explains that it subsequently acquired lands on both sides of the South Fork Eel River and that such acquired lands separate the former inventory units. BLM states that public comment received in response to its Draft Resource Management Plan for the Arcata Resource Area raised the issue of wilderness designation for these lands. ^{2/} Therefore, in August 1989, BLM completed a second inventory of the South Fork Eel River Unit 1 which comprises 8,073 roadless acres and includes the former Brush Mountain and Elkhorn Ridge units as well as acquired lands separating the two units. BLM states that its second inventory was completed pursuant to section 201 of FLPMA, 43 U.S.C. § 1711 (1988), which provides:

(a) The Secretary shall prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including but not limited to, outdoor recreation and scenic values), giving priorities to areas of critical

^{2/} BLM notes that this issue has also been raised in The Wilderness Society v. John T. Lloyd, No. C-89-1093 (N.D. Cal. filed Mar. 31, 1989) which has been informally suspended pending BLM's completion of the South Fork Eel River Wild and Scenic River Management Plan and EIS (Answer at 4 n.5). The degree of public interest in wilderness review of the area, and BLM's response are detailed in Response to Statement of Reasons, Exh. C (unpaginated) at 4, as follows:

"Although there has been public support for additional wilderness review of the South Fork Eel River area, this support has been for an area of over 5,000 acres. None of the comments on the inventory supported wilderness study of an area of less than 5,000 acres. Of the comments which identified an acreage figure, 34 supported an area of 19,000 to 19,900 acres and 42 supported an area which included Cahto Peak which is not in the inventory unit. Any area that included Cahto Peak would be larger than 19,000 acres. Three comments supported an area over 5,000 acres. The Bureau completed a wilderness inventory in 1979 of units that are similar in area and size to the roadless 2,000 acre parcel west of the river and the parcel of less than 3,000 acres east of the river. The Bureau concluded these areas did not qualify as a WSA. The situation is unchanged. Neither of these parcels qualify as a WSA. The existing small roadless parcels remaining are not of sufficient size to make practicable their preservation and use in as [sic] unimpaired condition and are not of a size suitable for wilderness management. Therefore, the area did not meet the size criteria nor the exemptions to the size criteria."

environmental concern. This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values. The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of public lands.

BLM's inventory summary and supporting documentation indicate that approximately 27 percent of the area in the South Fork Eel River Unit 1 has been logged over a 25-year period between the late 1950's and early 1980's. The decision states:

Sixteen areas have been logged within the unit. These timber cuts are unnatural in appearance. The combination of unnatural timber cuts, cherry-stemmed roads and private inholdings [six inholdings totalling about 900 acres] has the effect of creating a corridor through the center of this unit which clearly does not have wilderness values. As a result there are two roadless blocks of public land east and west of the river. An additional block of roadless public land lies in the southern edge of the unit. These blocks of public land are each less than 5,000 acres.

The area does not contain a 5,000 acre block of public land that is natural in appearance.

The inventory summary lists 16 timber harvests and notes that a network of over 50 miles of abandoned logging roads and skid trails are spread throughout the harvest areas. In addition to the impacts of timber harvests, the area contains other vehicle trails, water facilities, firebreaks, abandoned vehicles, and a cabin. Because of these intrusions, BLM concluded that the area did not meet the naturalness criterion and therefore did not qualify for wilderness study.

Appellants' first argument is that BLM improperly ignored its own procedures, as set forth in the Wilderness Inventory Handbook (WIH), in conducting the 1989 inventory, and, as a consequence, excluded the public from the inventory process. Appellants refer to a flow chart of the wilderness inventory summary appearing on page 9 of the WIH. The first steps of that chart are: (1) BLM State Director starts inventory by public announcement; (2) BLM districts conduct initial inventory; and (3) State Director issues proposed initial inventory decision. If the initial decision eliminates lands that clearly and obviously do not meet WSA criteria, it is to be followed by a 90-day public review period. Thereafter, the State Director is to issue his final initial inventory decision. Appellants contend that the 90-day public review period was never provided in that both the initial and the final inventory decisions are dated August 28, 1989. Appellants contend that BLM issued inconsistent signals as to whether the 1989 inventory was or was not governed by the WIH. Appellants assert that the inventory evaluated lands never before inventoried and was in fact subject to the initial

wilderness inventory procedures of section 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1988).

BLM responds that the WIH is limited to wilderness inventories conducted pursuant to section 603 of FLPMA, 43 U.S.C. § 1782(a) (1988) and is not applicable to the inventory at issue here which was conducted pursuant to section 201 of FLPMA, 43 U.S.C. § 1711 (1988). In any event, BLM submits that "appropriate portions" of the WIH (those dealing with the substantive standards in the Wilderness Act and FLPMA), were used as guidelines for the inventory. BLM asserts, however, that the section 603 inventory was completed in 1979 and points out that its Final Intensive Inventory, December 1979 (Exh. B), states at page 164: "If private lands between [the Elkhorn Ridge Unit and Brush Mountain Unit] ever become public land, BLM will study the area using current land use planning processes and wilderness will be one of the uses studied at that time." BLM further explains its 1989 inventory as follows:

The Bureau did inventory the entire block of land, including the units inventoried in 1979 and the lands which were acquired after 1979. The purpose was to insure that any configuration creating a block of 5000 acres of roadless public lands could be considered for additional wilderness review. The Bureau's action does not convert the inventory into one conducted under section 603 of FLPMA. As noted above, the Bureau stated in 1979, at page 164 of Final Intensive Inventory, that if private lands were acquired the Bureau would inventory the area for its wilderness potential. This is exactly what the Bureau has done. Whatever label is placed on the 1989 inventory, it was conducted under the authority of section 201 of FLPMA.

(Response to Appellants' Reply Memorandum in Support of Notice of Appeal and Request for Stay at 2).

BLM asserts that the public was notified of its inventory findings in the "Final Environmental Impact Statement and Proposed Arcata Resource Management Plan" in September 1989, and that its findings were published in the Federal Register on February 1, 1990 (55 FR 3494). BLM states that it issued news releases to local newspapers and sent individual notices to approximately 250 persons on the Ukiah District's mailing list. A 30-day period was afforded for the public to submit comments. ^{3/} Four protests, by appellants herein, were received and denied by the June 22, 1990, decision of the State Director (Answer at 6-7).

[1] The proper scope of the wilderness inventory conducted under sections 201 and 603 of FLPMA, 43 U.S.C. §§ 1711 and 1782 (1988), involves a determination of whether the land inventoried is possessed of the wilderness characteristics defined by Congress so as to require a designation as a WSA. James Stewart Co., 71 IBLA 100, 102 (1983).

^{3/} The FR notice stated that the comment period would end on Friday, Mar. 9, 1990.

In conducting the wilderness inventory, BLM has been guided by WIH and its amendments. As we stated in *Sierra Club*, 61 IBLA 329, 334 (1982), the WIH and its amendments are guidelines which are binding on BLM. We also noted in that case that the ultimate question is not whether BLM employees flawlessly follow every direction contained in the WIH, but whether the BLM decision correctly applies the statutory criteria. In subsequent decisions we stated that where an appellant establishes that BLM failed to follow its guidelines and also shows affirmatively that such failure caused BLM to reach an incorrect conclusion, reversal of the BLM decision is required. See *Committee for Idaho's High Desert*, 62 IBLA 319, 322 (1982); *Utah Wilderness Association*, 72 IBLA 125, 128-29 (1983).

Appellants' principal complaint is that BLM failed to allow for sufficient public comment. Appellants suggest that had such an opportunity been provided, the State Director could have made a more enlightened decision (Appellants' Reply Memorandum at 5-6). BLM's decision record does not reveal that appellants, or the public at large, were in any way disadvantaged or hindered in making their views on the South Fork Eel River Unit 1 known to BLM (see note 2, *supra*, and public involvement and comment section of inventory file). Appellants' protests were duly acknowledged and answered. Appellants have not shown that a more voluminous public participation over a longer period of time would have compelled a substantive result other than that reached by the Ukiah District and confirmed by the State Director.

As this Board has often held in appeals challenging a BLM determination to include or exclude land as a WSA, an appellant has a particularly heavy burden. It must show that the decision appealed from is based on a clear and specific error of law or fact. Failing such a showing, the decision will be affirmed. See *Committee For Idaho's High Desert*, 85 IBLA 54, 57 (1985); *John R. Swanson*, 84 IBLA 127 (1984); *Merrill G. Hastings*, 60 IBLA 54 (1981).

Appellants contend that BLM's inventory is based on incomplete data and erroneous assumptions. Appellants allege that BLM failed to compile supporting documentation, particularly to show the impact of logging, and that BLM grossly overstated the areas logged. Counsel for appellants refers to the declarations of Michael Huddleston, Peter Steel, Steven Day, Eric Swanson, and Ron Guenther as confirming these assertions. In their declarations appellants assert that the imprints of man can easily be removed from the lands in question and those lands would return to a natural state in a few years' time. Michael Huddleston avers that these areas were too steep and rugged to have been subject to logging, or that they contained no merchantable timber, thus challenging BLM's conclusion that 27 percent of the area had been subject to logging (Declaration of Michael Huddleston at 2). Huddleston also alleges that BLM's timber harvest figures are inaccurate and unreliable because they were based on aerial photos and interviews with local residents rather than documented surveys. Huddleston asserts that some of the areas logged decades ago have become reforested and that old trails are now brush covered and unnoticeable (Declaration of Michael Huddleston at 2-4).

BLM responds that its decision is based on a field survey, aerial photographs, land exchange appraisal reports, State and BLM timber sale records, and miscellaneous in house records. BLM refers to the inventory report, contending that the effect of past logging renders the harvest areas unnatural in appearance and that elimination of the harvest areas and the areas of private inholdings "effectively cuts the unit into three separate and smaller blocks of roadless lands, each of which contains considerably less than 5,000 acres and effectively eliminates the areas located on either side of the South Fork Eel River" (Answer at 10). BLM concedes that "pockets of old growth habitat" exist within the unit, but that significant portions of the unit have been disturbed. BLM also notes that while regeneration and a return to a natural state may be occurring, the purpose of the inventory is to "locate areas that meet wilderness criteria and not to create wilderness where it does not presently exist" (Answer at 12). BLM cites section 2(c) of the Wilderness Act, 16 U.S.C. § 1131(c) (1988), and "Organic Act Directive, Change 3" in support of the policy that potential for rehabilitation should not be the basis for concluding that wilderness values exist in a unit.

In response to appellants' challenge that the inventory was inadequately documented, BLM points out that its decision record contains numerous photographic materials, Geological Survey's topographic map, in addition to aerial photographs with overlays showing timber harvest areas, roads, trails, land status, and the inventory boundaries. Also among the documents are copies of sections of the Hardwood Exchange File, initial report of trespass (cabin), Post Compliance Check and Special Recreation Use Permit (Camp St. Michael), road identification sheet, and various inventory maps. BLM further notes that its inventory file has been available for public review throughout the inventory process (Response to Statement of Reasons, Exhibit C (Exh. C), at 5-6).

Specifically responding to the Huddleston charges concerning the impacts of logging, BLM notes that on the ground inspections were made, that the inventory team hiked through 8 of the 16 logged areas in 1989, and "has been in most of the logged areas from 1979 to 1984" (Exh. C at 6). BLM stands by its data that douglas fir and redwood have been selectively harvested from 2,170 acres or 27 percent of the area. Each logging operation was described as either high grade selective or a seed tree cut. The inventory does not suggest that the 2,170 acres affected by logging were clear cut or that every acre within a logged area was cut. Attached to Exhibit C is a Report on Identification of Past Logging and Estimation of Years of Activity and Acres. The report states that logged areas were documented by aerial photographs and ground proofing. The areas were hiked by BLM specialists who took photos and annotated maps of the inventory unit.

[2] Our review persuades us that BLM's decision is supported by a well-documented inventory file, and is in accord with statutory and agency guidelines. The inventory file supports the conclusion that the area is not natural and contains imprints of man which are substantially noticeable.

Therefore, the area does not meet the criteria of the Wilderness Act. ^{4/} In pressing their views and arguments appellants appear to have disregarded the bulk of the data collected and relied on by BLM in its decision process. While the interpretation of any set of data is obviously a subjective process on which opinions may vary, appellants' disagreements are insufficient to establish an error of either fact or law in the South Fork Eel River inventory. As stated in Richard J. Leaumont, 54 IBLA 242, 245, 88 I.D. 490, 491 (1981):

These [wilderness] evaluations are necessarily subjective and judgmental. BLM's efforts are guided by established procedures and criteria, and are conducted by teams of experienced personnel who are often specialists in their respective areas of inquiry. Their findings are subjected to higher-level review before they are approved and adopted. Considerable deference must be accorded the conclusions reached by such a process, notwithstanding that such conclusions might reach a result over which reasonable men could differ.

See also Committee For Idaho's High Desert, *supra* at 58.

Pursuant to the Wild and Scenic Rivers Act (WSRA), 16 U.S.C. § 1271 (1988), the South Fork Eel River was designated a wild and scenic river in 1981 (46 FR 7484 (Jan. 23, 1981)). Appellants contend that BLM should have given "controlling weight" to the Eel River designation under WSRA in its assessment of the wilderness potential of the adjacent uplands.

[3] Appellants cite no authority for this proposition and, as BLM points out, the legislative history of WSRA would seem to indicate the contrary. S. Rep. No. 502, 94th Cong., 1st Sess., discussed the effect which the provisions of the Act would have on lands included within the Upper Missouri Wild and Scenic River:

Because the word "wild" is a part of the Wild and Scenic Rivers Act, many assume that the wild and scenic rivers are treated like wilderness areas. It is erroneous, however, to make an analogy between the Wild and Scenic Rivers Act and the Wilderness Act. The Wild and Scenic Rivers Act should more properly be considered a multiple-use act, save one use. The only use prohibited is impoundment; the river segment must remain free flowing.

^{4/} While the imprints of man must be "substantially unnoticeable," they need not be completely unnoticeable. Certain man-made structures and marks may be evident in an area without affecting its suitability for preservation as wilderness. See WIH at 12-13. However, the determination required to be made is whether the overall impact of man's intrusions is or is not substantially noticeable (WIH at 13). Here, the determination that the area is not natural is amply supported by the record.

The criteria under which BLM is required to make wilderness evaluations have been set out earlier in this opinion and in many previous Board decisions. That WSRA designation should carry special weight in a wilderness inventory evaluation has never been pronounced or suggested in prior Board decisions. See Hoosier Environmental Council, 109 IBLA 160, 171 (1989); John R. Lynn, 106 IBLA 317 (1989).

Appellants suggest that BLM's inventory decision is an action requiring the preparation of an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) 42 U.S.C. § 4332 (1988). As authority for this proposition appellants cite State of California v. Block, 690 F.2d 753 (9th Cir. 1982). In Block, the court reviewed the sufficiency of a Forest Service Final EIS which called for allocating 15 million acres of "RARE II" (roadless area review and evaluation) lands to wilderness, 10.8 million acres to further planning, and 36 million acres to nonwilderness. The issue in the case was whether the EIS adequately examined the site-specific impact of the proposed action with respect to the lands allocated to nonwilderness. The court found that the Forest Service's commitment of the areas to nonwilderness uses was "irreversible and irretrievable," that the EIS was deficient in that it failed to consider the effect of the nonwilderness classification upon future opportunities for wilderness classification, and in assuming that nonwilderness areas should be developed. Id. at 762-67. BLM's inventory in the case at bar assessed the wilderness characteristics of the lands. It did not allocate the resources of the area to specific purposes, an action which could have required the preparation of an EIS. 43 CFR Subpart 1610. As BLM notes, inventories of the public lands under section 201 of FLPMA, 43 U.S.C. § 1711 (1988), do not encompass "federal actions or proposals," do not change or prevent change in the management or use of the lands affected, but simply document the wilderness or nonwilderness characteristics of those lands. Appellants' argument is without merit.

Finally, appellants argue that BLM's inventory violates section 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1988), because the "inventory decision * * * threatens displacement of [the northern spotted owl] due to the ensuing development activities that would be precluded under wilderness designation * * * " (Supplemental SOR at 6). Appellants assert that BLM failed to consult with the U.S. Fish and Wildlife Service as required by the above statute.

BLM responds that its decision eliminating the lands in question from further wilderness study is not an action impacting the habitat of the northern spotted owl. As BLM points out, consultation with the U.S. Fish and Wildlife Service has already been initiated in connection with the preparation of the August 1990 Draft River Management Plan and Environmental Impact Statement (South Fork Eel Wild and Scenic River) (Exh. D at 13).

To the extent appellant has raised arguments not specifically discussed herein, they have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

John H. Kelly
Administrative Judge

I concur:
Wm. Philip Horton
Chief Administrative Judge

